

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

<b>In re:</b>	:	
	:	<b>Chapter 11</b>
<b>USG CORPORATION,</b>	:	
<b>a Delaware corporation, et al.,</b>	:	<b>Jointly Administered</b>
	:	<b>Case No. 01-2094 (JKF)</b>
<b>Debtors.</b>	:	
	:	
	:	
<hr/>	:	
<b>USG CORPORATION, et al.,</b>	:	
	:	
<b>Movant</b>	:	
	:	
<b>v.</b>	:	
	:	<b>Civil Action No. 04-1559 (JFC)</b>
<b>OFFICIAL COMMITTEE OF</b>	:	<b>Civil Action No. 04-1560 (JFC)</b>
<b>ASBESTOS PERSONAL INJURY</b>	:	
<b>CLAIMANTS, et al.,</b>	:	<b>Hearing: 6/13/05 2:00 p.m.</b>
	:	
<b>Respondents.</b>	:	

**DEBTORS' BRIEF REGARDING REQUEST FOR DISCOVERY IN ADVANCE OF  
HEARING ON ISSUES TO BE CONSIDERED IN ESTIMATION**

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## I. INTRODUCTION

A central issue in this case is whether the Court will consider the merits of the asbestos personal injury claims in estimating debtor United States Gypsum Company's ("U.S. Gypsum") liabilities, or rely solely upon certain claims resolution history, as proposed by the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants' Representative (collectively the "ACC").

There is no question that the goal of estimation is to predict the number and value of *valid* asbestos personal injury claims that have been and will be asserted against U.S. Gypsum or the asbestos trust, so that a plan of reorganization will provide for the proper funding of payable claims. This does not mean that estimation determines the merits of the claims of particular individuals but, rather, that estimation outlines the characteristics of those claims that likely will be valid, so that the number and value of such claims may be estimated.

This exercise is not only important to Debtors<sup>1</sup>, it is important to Debtors' creditors and stakeholders, including those asbestos claimants with legitimate claims. All parties have an interest in seeing that Debtors' resources are used to pay only valid claims; thus, the characteristics of valid claims must be considered in estimation. Where claims are contested, as in this case, due process guarantees Debtors the opportunity to present a meaningful defense to those claims. As Judge Wolin concluded with respect to the issues to consider in estimation: "In an asbestos bankruptcy, the Court will, within the constraints of the law, reject unsubstantiated claims, bogus medical evidence and

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<sup>1</sup> The term "Debtors," as used herein, is a convention used for convenience. The vast majority of the asbestos personal injury claims at issue are asserted against only one debtor, U.S. Gypsum. Debtors other than U.S. Gypsum are not responsible for the asbestos liabilities arising from products manufactured or sold by U.S. Gypsum.

fanciful theories of causation. The Court will protect those who have been truly harmed." (February 19, 2003 Order at 4.)

Pursuant to Debtors' estimation proposal, Debtors will present evidence during estimation that certain categories of claimants have sustained no compensable harm or, based on their alleged asbestos exposures, likely cannot establish that U.S. Gypsum's products are responsible for any claimed injuries. (*See* Debtors' previously filed Estimation Decision Tree, attached hereto as Exhibit A.) The ACC, on the other hand, submits that estimation should consist only of testimony with respect to U.S. Gypsum's claims resolution history and, based solely on that history, predictions regarding the number of future claims that should be paid. The ACC argues that evidence about the characteristics of claimants who have no compensable injury or no meaningful exposure to U.S. Gypsum's products should be excluded entirely from estimation.

The parties agree that the question of which issues and evidence will be considered in estimation is the threshold question for the Court to decide after briefing and a hearing. The parties disagree, however, as to what, if any, discovery is needed before the Court can make an informed decision.

The Court does not need discovery to decide whether it is necessary to consider the merits of claims in estimation. Indeed, Judge Wolin entered an order in this case that estimation would consider the merits of the claims after briefing on the issue, absent any discovery and without any request for discovery from any party, including the ACC.

The ACC now requests, for the first time, discovery in three general areas prior to the Court's determination of the issues to be considered in estimation. The three general areas are: (1) the scientific evidence regarding the merits of the personal injury claims;

(2) Debtors' tort system experience; and (3) Debtors' proposed sampling of personal injury claims for estimation purposes.<sup>2</sup> The ACC purports to need four to six months for this discovery. Debtors understand that the ACC does *not* contemplate mutual and complete discovery on these issues, but, rather, one-sided discovery where the ACC obtains discovery of Debtors and their experts, but Debtors are not granted the reciprocal discovery on the same issues. Debtors repeatedly have offered to begin full and complete discovery, but the ACC continues to reject this offer and instead adheres to their proposal for only partial and one-sided discovery before the estimation determination.

The ACC's discovery proposal is impermissible and wasteful. The Court cannot decide whether to consider the merits in estimation based on one-sided discovery. And, if the Court ultimately does consider the merits, as Debtors believe it must, the discovery will have to be repeated. Debtors respectfully request that the Court deny the ACC's call for another half-year of delay for unnecessary and one-sided discovery and, instead, schedule complete and mutual discovery at the appropriate time.

## II. DISCUSSION

### A. **Discovery Regarding Scientific Evidence is Not Relevant to Determining Whether to Consider the Merits of Claims in Estimation.**

In estimating U.S. Gypsum's liability for asbestos personal injury claims, the Court should consider: (1) whether claimants who do not manifest physical harm (those who are "unimpaired") have a compensable injury under applicable law and how those claims should be treated in estimation; (2) whether the scientific evidence supports the claim that chrysotile asbestos causes mesothelioma; (3) whether claimants who, by

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<sup>2</sup> To date, the ACC has not provided a statement of the specific discovery they wish to take and have been vague on exactly what discovery they seek. Debtors' present understanding of the desired discovery is based on meet and confer conversations and correspondence with counsel.

virtue of their occupations or otherwise, have not had exposure to U.S. Gypsum's asbestos-containing products sufficient to cause disease have compensable claims; (4) whether the scientific evidence supports the claim that asbestos exposure causes cancers other than lung and mesothelioma; and (5) whether the scientific evidence supports the claim that lung cancer in the absence of asbestosis is asbestos-related. (See Exhibit A, "Part 1: Determine the Characteristics of Valid Claims" on Debtors' Estimation Decisional Tree.)

Although Debtors do not have the benefit of the ACC's specific discovery proposal, based on meet and confer communications to date, Debtors believe that the ACC will seek discovery to support their argument that some epidemiologists still believe chrysotile asbestos can cause mesothelioma. Debtors similarly expect that the ACC's discovery will be designed to demonstrate that not all epidemiologists agree as to the level of asbestos exposure needed to cause disease. But this discovery is not relevant to whether evidence regarding claim validity should be *heard*, which is the question at hand; it may be relevant to whether this evidence ultimately will be *accepted* and accounted for in the estimation. The ACC's belief that their arguments regarding the science ultimately will prevail, and therefore an estimation considering the merits of claims is futile, provides no basis to deny Debtors their right to present the evidence and contest the claims against them.

**B. The Discovery Proposed Will Impermissibly Disadvantage All Other Parties and Waste the Estates' Resources.**

Although Debtors do not believe that the discovery the ACC seeks is appropriate at this stage, to move this proceeding forward, Debtors offered to proceed with mutual discovery on all medical, scientific, and factual questions relevant to

estimation of U.S. Gypsum's liability. Debtors believed that such an approach would resolve the dispute between the parties and allow all discovery to be conducted efficiently and at one time. The ACC rejected this offer.

By pursuing only one-sided discovery and avoiding the discovery Debtors require to establish their defenses (such as claimant discovery), the ACC is manipulating the discovery process. The ACC seeks to ensure that the Court's decision regarding the issues to consider in estimation can only result in (1) a summary rejection of Debtors' arguments regarding claim validity without Debtors ever being given a full and fair hearing on these issues or (2) a decision to hear the merits in estimation, which would require a round of mutual discovery and an inevitable repetition of the discovery previously taken from the Debtors' experts. In this way, the hearing regarding the issues to consider in estimation offers no possibility for Debtors to advance their case, yet guarantees the ACC "two bites at the apple." The ACC's attempt to use discovery as a tool to gain an undue advantage should not be condoned. *Buffington v. Wood*, 351 F.2d 292, 297 (3d Cir. 1964) (finding that courts must "avoid giving potential discovery advantages to one party over the other").

By seeking only partial discovery, the ACC asks the Court to decide that Debtors' claim validity arguments will not be heard without considering all the relevant evidence. For example, the ACC will try to establish that experts disagree as to how much exposure is needed to cause disease, but at the same time the ACC opposes any discovery of claimants (even those with pending lawsuits against U.S. Gypsum) regarding their exposure history. By this approach, the ACC hopes to keep from the Court the evidence that will reveal that many claimants, because they never worked in the construction

industry where U.S. Gypsum's products were used, have such minimal or non-existent levels of exposure to U.S. Gypsum's products that no credible expert would find those products were a cause of disease. The Court should not make a determination to exclude Debtors' claim validity arguments from estimation based only on partial evidence.

The ACC's proposal is as inefficient as it is unfair. The ACC proposes that rather than hear all of the relevant evidence in a single hearing, the Court should hold a one-sided preview and then decide whether to hold another hearing on the same issues later. The ACC, in essence, proposes that the Court have a hearing to consider the merits of the scientific issues in deciding whether to have a hearing to consider the merits of the scientific issues. Not only would a mini-hearing on the merits waste the Court's time, it will needlessly drain the estates' resources. If the Court determines that the estimation must consider the merits of claims, full discovery will inevitably produce redundancies of the previous discovery efforts. There is little doubt that if the ACC's discovery requests were granted, many or most of Debtors' experts will need to prepare reports, give depositions, and testify twice.

**C. The ACC Already Has Access to U.S. Gypsum's "Tort System History."**

Another area of potential discovery referenced by the ACC in their Estimation Decision Tree is Debtors' "tort system history (CCR and USG)." The ACC, however, already has the *very same database* that Debtors have, which contains the settlement history of claims filed against U.S. Gypsum since 1985, when U.S. Gypsum became a member of the Asbestos Claims Facility, which existed prior to the Center for Claims Resolution ("CCR"). In fact, the ACC's involvement with many asbestos defendants, both in and out of bankruptcy, likely gives them *broader knowledge* of the

settlement history of asbestos personal injury claims than Debtors possess. It is difficult to fathom what additional tort system history discovery the ACC needs to be in a position to brief the Court regarding what issues should be considered in estimation.

**D. Sampling Is An Accepted Discovery Tool, Although Issues Relating to Sample Size and Composition May Be the Subject of Discovery.**

The ACC also has asserted that they believe claimant sampling, in general, is not reliable or useful in the estimation process, and the ACC previously has suggested that they would like discovery to demonstrate that proposition. Whether sampling is appropriate is, however, a legal question for the Court. Indeed, the use of statistical sampling is a well accepted alternative to impracticably costly and time-consuming discovery. *See, e.g., Manual for Complex Litigation, Third* § 21.422 ("statistical sampling techniques may be used to measure whether the results of the discovery fairly represent what unrestricted discovery would have been expected to produce"); § 21.493 ("In some cases, sampling techniques may provide the only practicable means to collect and present relevant data"). Given the Court's broad discretion to admit statistical sampling evidence, discovery into the issue of sampling is unnecessary prior to the Court's decision regarding the issues to consider in estimation.

The ACC also has asserted that Debtors' proposed sampling raises statistical and factual issues, such as whether the sample size is sufficient. In an effort to resolve these issues, Debtors have offered to provide discovery of their expert statistician with respect to Debtors' sampling plan. Debtors also proposed that the ACC provide discovery of their expert who will criticize, or offer an alternative to, Debtors' sampling proposal. Debtors submit that the particulars of the sampling protocol for discovery purposes may be resolved after the estimation methodology determination; however, Debtors are not



opposed to engaging in reciprocal discovery with respect to the sampling protocol prior to that determination.

**E. Under Debtors' Proposal, the ACC Will Not Be Deprived of Discovery.**

Denying the ACC's requested discovery at this point will in no way deprive the ACC of the opportunity to pursue discovery and present their arguments on the merits. The ACC will have the opportunity to pursue their desired discovery prior to a determination of the characteristics of valid claims, and the ACC may advance their theories with respect to Debtors' arguments at the estimation hearing. At that time, the Court will have all the substantive evidence before it and will be in a position to make a fully informed decision as to claim validity and estimation.

**III. CONCLUSION**

The partial, one-sided discovery requested by the ACC before the hearing regarding whether to consider the merits of claims in estimation is unnecessary and unfair. The ACC improperly views the hearing on whether to consider the merits of claims in estimation as an opportunity to serve up their contentions of the alleged flaws in Debtors' claim validity arguments. The ACC seeks to do so while refusing the discovery Debtors require to demonstrate the characteristics of truly valid claims.

Debtors respectfully request that the Court deny the ACC's discovery and set a briefing and hearing schedule with respect to the estimation methodology determination or, alternatively, order full and complete discovery requested by all parties prior to the

estimation methodology determination to avoid a duplication of efforts and a waste of resources.

Dated: April 26, 2005

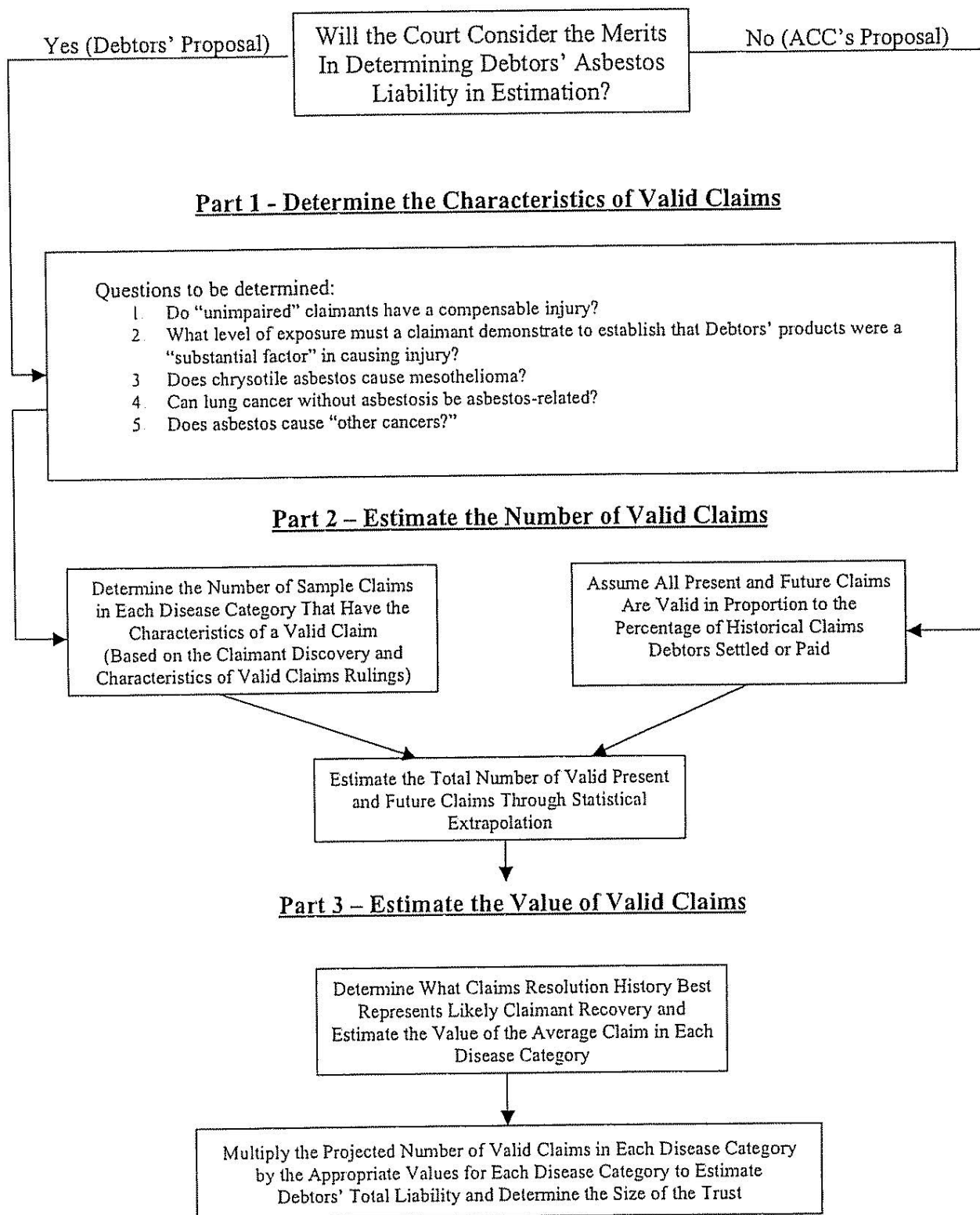
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**EXHIBIT A**

## ESTIMATION DECISIONAL TREE



UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2005, I electronically filed ***Debtors' Brief Regarding Request for Discovery in Advance of Hearing on Issues to be Considered in Estimation*** with the Clerk of Court using CM/ECF which will send notifications of such filing to the following:

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<sup>1</sup> As defined in and in accordance with *Order Establishing Case Management and Scheduling Procedures for All Matters in the Above-Captioned Bankruptcy Cases Which the Reference has been Withdrawn from the United States Bankruptcy Court for the District of Delaware to the United States District Court for the District of Delaware* [Docket No. 8 in Case #04-1560; Docket No. 6 in Case #04-1559 – entered March 23, 2005]

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